89-1268

Supreme Court, U.S.
FILED
OCT 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

SUPREME COURT OF THE UNITED STATES

October Term, 1989

In the Matter of the Judicial Settlement of the Accounts of Proceedings of Frances E. R. Harrisingh, as Administratrix of the Goods, Chattels and Credits of

IVAN C. McLEOD,

Deceased.

-0-

FRANCES E. R. HARRISINGH,

Petitioner,

vs.

JOHN A. FOWLER, Esq.,

Respondent.

On Petition for a Writ of Certiori to the New York Supreme Court, Appellate Division, Second Judicial Department

---

PETITION FOR WRIT OF CERTIORARI

FRANCES E. R. HARRISINGH
Petitioner Pro Se
36 Rugby Road
New Rochelle, N. Y. 10804
(914) 235- 3851

QUESTIONS PRESENTED

1. Was the Appellate Division's summary dismissal *sua sponte* of petitioner-administratrix' prior appeal taken from an order of the Surrogate's Court, Westchester County, which denied petitioner's motion for an order resettling a decree entered in a final accounting proceeding, as an incident of its denial of petitioner's motion made under a second appeal for a stay of execution of a civil contempt order entered against petitioner in the Surrogate's Court on the motion of the respondent-guardian-*ad-litem*, pending the petitioner's appeal from the contempt order, and after the refusal of the Appellate Division to dismiss the prior appeal under an earlier motion of the guardian-*ad-litem*, a denial of petitioner's constitutional right to due process under the Fourteenth Amendment?

2. Was the Appellate Division's denial of a stay of execution of a civil contempt order against petitioner entered in the Surrogate's Court, pending petitioner's appeal from that order, based upon circumstances perceived by the Appellate Division to affect the case but not evident in the motion papers before the court or addressed by the parties, and without affording petitioner an opportunity to address the dispositive circumstances alluded to by the appellate court, a denial of due process to petitioner as guaranteed under the Fourteenth Amendment?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents iii

Table of Citations iv

Opinion Below 2

Jurisdiction 5

Statute, Rules and Constitutional Provisions Involved 5

Statement of the Case 7

Reasons for Granting the Writ

I. The failure of the Appellate Division to accord petitioner her common law and statutory right to avoid an accounting through procurement of the distributee's consent to a discharge decree was so substantial a deprivation of due process as to justify and require intervention and disapproval by this court. 15

II. The Appellate Division's denial of remedial relief to the petitioner pending her second appeal based upon circumstances perceived by it to be dispositive but not apparent to the parties or evident from the motion papers before it without giv-

Contents

Page

ing the moving petitioner an opportunity before ruling to address its concerns fails to accord due process to the petitioner. 19

Conclusion 24

TABLE OF CITATIONS

Cases Cited:

In re Kahn's Estate, 144 N.Y.S.2d 253, affirmed, 2 A.D.2d 893(2d Dept.,1956) 20

Mareno v. Kibbe, 32 A.D.2d 823(2d Dept.,1969) . . . 22

Matter of Wagner's Estate 119 N.Y. 28(1890), 22 N.E. 200 . . 20

Rovello v. Orofino Realty Co. 40 N.Y.2d 633(1976) 23

Windsor v. McVeigh 93 U.S. 274(1876) 23

Statute Cited:

Section 2203, SCPA 6,20

United States Constitution Cited:

Fourteenth Amendment, Section 1 . . 5,6

Rules Cited:

Rules of the Appellate Division, Second Department:

Contents

Page

Rule 670.8(e) 7,17

Rule 670.24(a) 7,18

APPENDIX

Appendix A - Decision and Order on Motion of the Appellate Division 1a

Appendix B - Decision and Order on Motion of the Appellate Division 3a

Appendix C - Order establishing Creditor's Claim, denying Revocation of Letters of Administration and Compulsory Accounting . . 5a

Appendix D - Waiver and Consent of Widow of Deceased 10a

Appendix E - Order appointing Guardian-ad-Litem for Widow of Deceased 12a

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

In the Matter of the Judicial Settlement of the Accounts of Proceedings of Frances E. R. Harrisingh, as Administratrix of the Goods, Chattels and Credits of

IVAN C. McLEOD,

Deceased.

-O-

FRANCES E. R. HARRISINGH,

Petitioner,

vs.

JOHN A. FOWLER, Esq., Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

The petitioner, Frances E. R. Harrisingh, respectfully prays that a writ of certiorari issue to review the order and decision of the Appellate Division of the Supreme Court of

the Supreme Court of the State of New York, Second Judicial Department, entered in this proceeding on July 14, 1989, as amended by an order entered herein on August 18, 1989.

OPINION BELOW

The order of the Appellate Division denied in all respects, as to the petitioner's second appeal, her omnibus motion (1) to stay enforcement of a civil contempt order entered against her in the Surrogate's Court, Westchester County, on April 20, 1989, (2) for an order enlarging her time to perfect her appeal from the contempt order, and (3) to consolidate the second appeal with her first appeal from a Surrogate's Court order denying her motion to resettle a decree entered on February 11, 1988 in the accounting proceeding; and, as to the petitioner's prior appeal, dismissed this appeal sua sponte without costs on the

on the ground of lack of prosecution. The appellate order was accompanied by a brief decision which are unreported, and are reproduced in Appendix A to this petition.

The petitioner's prior appeal before the Appellate Division, unlike her second appeal to that court, involved a hearing session, the minutes of which had not been settled, and was the subject of the petitioner's motion to compel, as to which the guardian-ad-litem filed a cross-motion to dismiss. Both motions were denied in an order entered on December 8, 1988 without opinion. The order is unreported, and is reproduced in Appendix B to this petition.

Central to an understanding of the guardian=ad-litem's presence in the case are two significant events which occurred in the Surrogate's Court upstream of that appointment. The first event was the establishment of a substantial claim a-

gainst the estate over the objection of the petitioner in favor of a creditor under the Surrogate's omnibus order entered May 21, 1981. And the second event was the subsequent Waiver and Consent of the sole distributee which was filed in the Surrogate's Court by the petitioner on or about June 17, 1983.

The guardian-ad-litem's appointment was made by order of the Surrogate entered sua sponte on August 1, 1985, more than two(2) years after the distributee's waiver and consent to the discharge of the petitioner as administratrix was filed in that court. And all of the issues raised in the two(2) appeals involv- the petitioner are post-waiver and consent issues which were effectively upstaged in the preemptive appellate rulings sought to be reviewed on certiorari.

The order establishing the creditor's claim is unreported, and is repro-

duced in Appendix C to this petition. The Waiver and Consent is reproduced in Appendix D to this petition. And the order appointing the guardian-ad-litem is unreported, and is reproduced in Appendix E to this petition.

JURISDICTION

The order sought to be reviewed by this court was entered July 14, 1989, and amended August 18, 1989, although the entry times are not noted of record. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1257(3).

STATUTE, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States reads in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

Section 2203(Decree on filing instruments approving accounts) of the Surrogate's Court Procedure Act reads in relevant part:

> 1. A fiduciary may present to the court a petition showing the names and post office addresses of all persons interested, that all taxes have been paid or that no taxes were due and that the petitioner has fully accounted and made full-disclosure in writing of his administration of the estate to all persons who would be required to be served with process in a proceeding under section twenty-two hundred ten of this article and praying for a decree releasing and discharging the petitioner.
>
> * * * *
>
> 3. The petitioner shall also file with the petition acknowledged instruments executed by all the persons who would be required to be served with process in a proceeding under section twenty-two hundred ten of this article . . . approving the account of the petitioner and releasing and discharging the petitioner.
>
> 4. The court may thereupon make a decree releasing and discharging the petitioner and the sureties on his bond, if any, from

any further liability to all persons interested.

Rule 670.8(e) Time for Filing Record on Appeal Where Transcript or Statement Not Involved.

Regardless of whether the appendix or the full record method be used to prosecute any civil cause, if it is prosecuted upon a record which does not involve a transcript or statement requiring settlement and certification pursuant to CPLR 5525, then the record on appeal must be filed with the clerk of this court within 30 days after the notice of appeal shall have been filed.

Rule 670.24(a) Dismissal Calendar Calls

In December of each year the clerk shall make up a calendar of all civil appeals or causes not brought on for argument within six months of the filing of the record or papers upon which the matter is to be heard, exclusive of such appeals or causes which are then on the calendar.

STATEMENT OF THE CASE

Ivan C. McLeod, a resident of Westchester County, and a lawyer, died on

March 21, 1979, and on April 16, 1979, the petitioner was appointed administratrix of his estate upon the nomination of his widow, Mary E. McLeod, who was the sole distributee of her late husband's estate. At the time of his death the deceased was separated from his wife who has then living in West Virginia, and later was moved at estate expense to Florida in search of better health care after becoming afflicted with cancer in West Virginia.

In Florida the widow executed and delivered to the petitioner a waiver of citation and consent to a decree settling the petitioner's accounts as administratrix, duly acknowledged in Brevard County, which the petitioner filed in the Surrogate's Court on or about June 17, 1983.

Prior to executing the Waiver and Consent form the widow had participated

along with the petitioner in filing papers in the Surrogate's Court in opposition to a claim filed with the petitioner at the instance of an alleged paramour of the deceased for a half interest in the deceased' residence property in New Rochelle in keeping with an oral promise the deceased is said to have made to sell the property and share its proceeds with her. However, owing to illness the widow was unable to come to New York and give testimony at the hearing held on the matter in the Surrogate's Court on November 14, 1980, in response to evidence allegedly implicating her in the ratification of the deceased' promise to the claimant. And the petitioner was unable to persuade the Surrogate or the irrepressible attorney for the claimant to delay the hearing until the widow was able to appear and

give her testimony.

The hearing went forward on schedule, and the claim was sustained by the Surrogate in his omnibus order entered on May 21, 1981.

An estate check in the amount of $37,105.95, representing one half of the net proceeds of the sale of the deceased' residence was paid over to the claimant's attorney on or about February 9, 1983, in a two-party format by the petitioner, who also delivered to the claimant's attorney at the same time a separate estate check in the amount of $10,000 as his attorney's fee. The attorney had refused the tender of payment on a number of previous attempts at making payment of the claim unless the attorney's fee was included. And, on more than one occasion accounting clerks on the Surrogate's Court staff had insisted that the $10,000 attorney's

fee would have to be paid to the claimant's attorney before the petitioner's accounts would be approved by them.

This preceded the widow's Waiver and Consent which, parenthetically, was obtained after full disclosure by the petitioner of the facts of the matter, and her complete satisfaction with the petitioner's role in the events noted herein. And when the petitioner recommended the prosecution of an appeal the widow replied that she would rather have her money now rather than to throw good money after bad. She also telephoned the court clerks and informed them that she wanted her money, and did not want an accounting.

With the creditor's claim satisfied the stage was set in 1984 when the petitioner filed her initial accounts and and petition, for a discharge decree in lieu of an accounting in view of

the widow's Waiver and Consent.

However, this never happened. What transpired instead was a protracted delay spanning a two year period during which the petitioner was obliged to revise and resubmit her accounts or parts thereof repeatedly to the satisfaction of first one clerk and then another. And, even when the clerks were finally satisfied that the petitioner's accounts were in order they refused to mark the proceeding for a discharge decree.

The petitioner was informed by the clerk's office that the Surrogate was going to appoint a guardian-ad-litem for the widow, which he proceeded to do in his order entered sua sponte on August 1, 1985, without attempting to serve legal process leading to this disposition upon the widow.

The petitioner seized the initia-

tive for bringing her long delayed discharge as administratrix on for a hearing by filing objections to an accounting. And, to no one's surprise, the guardian-ad-litem responded by filing a report objecting, among other things, to the $10,000 attorney's fee which the petitioner had paid from estate funds to the creditor's attorney under duress, for which he was later to be rewarded with a $7,000 fee also payable from estate funds while offering no evidence of the widow's mental incapacity at any relevant period of time - the sine qua non for his de facto appointment.

The matter came on for a hearing on July 14, 1986. And the focal point of decision in the Surrogate's Court centered on the proofs available to show payment of the money to the claimant's attorney, as well as to opportun-

ities available to the petitioner to marshal such proofs, including testimony to be elicited from the elusive claimant's attorney under subpoena. The July 14th hearing session concluded on a note of expectation to resume at a later date for the attorney's testimony, and, owing to the fiduciary's bank failing to produce the cancelled $10,000 check, for bank computer printout readings and testimony with a view toward identification of the payee.

However, these expectations were foiled when the Surrogate's Court rendered its decision surcharging the petitioner in the amount of $10,000 without ordering a resumption of the hearing for the receipt of the petitioner's testimonial and documentary evidence.

Due process issues were initially presented in the petitioner's Pre-Argument Statements which accompanied her

Notices of Appeal from the Surrogate's rulings. The Appellate Division's rulings spawned additional due process issues which are deemed preemptive, and which are addressed in this petition for the first time, there being under New York law no other state appellate tribunal to which the petitioner could prosecute a direct appeal from an intermediate appellate court's dismissal order and motion ruling.

REASONS FOR GRANTING THE WRIT

I.

THE FAILURE OF THE APPELLATE DIVISION TO ACCORD PETITIONER HER COMMON LAW AND STATUTORY RIGHT TO AVOID AN ACCOUNTING THROUGH PROCUREMENT OF THE DISTRIBUTEE'S CONSENT TO A DISCHARGE DECREE WAS SO SUBSTANTIAL A DEPRIVATION OF DUE PROCESS AS TO JUSTIFY AND REQUIRE INTERVENTION AND DISAPPROVAL BY THIS COURT.

The decision of the Appellate Division in this case to completely shut down the petitioner and put her out of business in-

sofar as judicial review in the state court system is concerned proceeds upon the unwarranted belief that the petitioner had failed to prosecute her initial appeal to that court diligently. The appellate panel reached this conclusion fully mindful of the fact that a prior panel had, in effect, ruled that while the appeal had merit the petitioner's undertaking to compel the clerk of the Surrogate's Court to transmit the hearing transcript to the Surrogate immediately for purposes of settlement and certification was premature.

Nothing appears in the motion record before the second appellate panel which can be construed as a relaxation or abandonment of the petitioner's efforts to procure settlement and certification of the hearing transcript, without which, perfection of the appeal could not go forward. In fact, the pe-

titioner's efforts in that direction were intensified in the aftermath of the first appellate panel's refusal to dismiss the appeal at the instance of the respondent guardian-ad-litem.

Appeals predicated upon hearing or trial transcripts are not circumscribed by the same strict time constraints which govern appeals not involving transcripts. See Rule 670.8(e), Appellate Division Rules. Consequently, a rule of reason must necessarily prevail where as here hearing or trial minutes are involved.

Given the operative facts in the case petitioner should have been discharged as administratrix without an accounting. Her difficulties in this case arise from being mired in the backwash created by the Surrogate's determination to pursue an agenda different from that dictated by the circumstances of the case.

Even so, the petitioner is content to work her way through the quagmire in order to achieve a just solution. It is the Appellate Division which appears to lack the patience necessary to enable the petitioner to vindicate herself.

So long as forces beyond the petitioner's control impede her from procuring the settlement and certification of the hearing transcript, a dismissal of her appeal in this context for lack of prosecution is nothing less than arbitrary, and out of step with acceptable notions of due process. Certainly, as long as the petitioner is endeavoring to compile a record which utilizes a transcript she should be able to expect that her case will not be placed in a dismissal mode prior to the filing of the record. See Rule 670.24(a), Appellate Division Rules. As applied in this case the court's rules have been

honored more in the breach than in the observance. Such practice cannot pass constitutional muster.

Legal representatives perform a quasi-public service, and, for that reason, should be given breathing room to perform their civic function as a team player, and not isolated and regarded as being just another adversarial entity in a private litigation. The failure of the courts to recognize the distinction is likely to send the message that the risks associated with public service in this area are far greater than the rewards which can be derived.

II.

THE APPELLATE DIVISION'S DENIAL OF REMEDIAL RELIEF TO THE PETITIONER PENDING HER SECOND APPEAL BASED UPON CIRCUMSTANCES PERCEIVED BY IT TO BE DISPOSITIVE BUT NOT APPARENT TO THE PARTIES OR EVIDENT FROM THE MOTION PAPERS BEFORE IT

WITHOUT GIVING THE MOVING PETITIONER AN OPPORTUNITY BEFORE RULING TO ADDRESS ITS CONCERNS FAILS TO ACCORD DUE PROCESS TO THE PETITIONER.

The second panel's denial of remedial relief to petitioner proceeds upon the unfounded belief that a conflict of interest exists in her relationships with the deceased and his widow. New York law favors the amicable settlement of estate matters between legal representatives and persons interested in the estate as creditors and beneficiaries. In re Kahn's Will (not officially reported), 144 N.Y.S.2d 253 (Surr. Ct., West. Co., 1955), citing Matter of Wagner's Estate, 119 N.Y. 28, 33-34 (1890), 23 N.E. 200, affirmed, 2 A.D.2d 893 (2d Dept., 1956); Section 2203, Surrogate's Court Procedure Act. Consequently, it is not unlikely that a legal representative would have intimate knowledge of and be privy to information affecting and relating to persons

interested in the estate which he or she is charged with administering.

In this case the petitioner, the appointed nominee of the deceased's widow and sole distributee, possessed such knowledge and information - a circumstance which is compatible with her role as administratrix of the deceased's estate. Moreover, the Surrogate, although presiding over a case lacking a post-waiver and consent basis for further judicial intervention in the case, nevertheless, drew upon the petitioner's knowledge of the widow's affairs and state of health, and went so far as to direct the petitioner at a hearing on September 23, 1986 to have herself appointed committee of the widow's property in Florida so that the petitioner could continue to receive interest payments on bank accounts in New York as administratrix and pay it over to the nursing home in Florida for the widow's care.

Of course, the Appellate Division was not privy to this information, and other colloquies between the Surrogate's Court and counsel relating to the widow's state of affairs, a portion of which is reflected in the aborted hearing transcript which has not been settled and certified yet.

The fact is that neither party made a point of raising the subject of conflict of interest on the motions, and the Appellate Division acted precipitously in the matter without waiting to be informed. And this, in derogation of its own rulemaking where a court wishes to ground its decision on a basis other than that which the parties have addressed on a motion before the court. See Mareno v. Kibbe, 32 A.D.2d 825(2d Dept.,1969). In Mareno, the Appellate Division said, " . . . we think that the parties should be apprised of the court's

intention so to treat the pending motions before it prior to decisions, so that an appropriate record and submission of the facts and law may be made by the parties. It is not apparent on this record that the parties were informed prior to decision of the court's determination to treat the pending motion as one for summary judgment."

The Mareno caveat has been cited approvingly by the New York Court of Appeals in Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 635(1976).

This court has long recognized the salutary effect of the Mareno caveat on due process. See Windsor v. McVeigh, 93 U.S. 274(1876). In Windsor the Supreme Court said, "A judgment of a court, pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination

of his rights, and is not entitled to respect in any other tribunal."

Windsor is applicable here, and should be applied here to permit the litigation below to run its course. The petitioner's integrity and professional reputation is on the line. Only if the litigation continues to it logical conclusion will the petitioner be vindicated. Due process in this context will be comfortable with nothing less.

CONCLUSION

For the reasons asserted herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCES E. R. HARRISINGH
Petitioner Pro Se

APPENDIX A - DECISION & ORDER ON MOTION OF THE APPELLATE DIVISION

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

ARTHUR D. SPATT, J.P.
STANLEY HARWOOD
VINCENT R. BALLETTA, JR.
ALBERT M. ROSENBLATT,JJ.

Motion No. 4887

In the Matter of the Estate of
Ivan C. McLeod, deceased.

Frances E.R. Harrisingh,
administratrix-appellant;John
A. Fowler, Esq., Guardian-ad-
Litem-respondent

Motion by appellant(1) to stay the enforcement of an order of the Surrogate's Court, Westchester County, entered April 20, 1989, (2) to enlarge time to perfect the appeal and (3) to consolidate said appeal with the appeal from an order of the same court, entered April 26, 1988.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied in all respects; and it is further,

ORDERED that on the court's own motion, the appeal from the order entered April 20, 1988 is dismissed, without costs, on ground ot lack of prosecution.

The papers on this motion contain no documentation to support the appellant's contention, that there is dual representation that she represents both the Estate of Ivan C. McLeod, deceased and the Estate of Mary E McLeon, deceased, and in any event, if that be the case it appears that such dual representation would be present a conflict of interest

SPATT,J.P.,HARWOOD,BALLETTAandROSENBLATT,JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

July 14, 1989

APPENDIX B - DECISION & ORDER ON MOTION OF THE APPELLATE DIVISION

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

WILLIAM C. THOMPSON, J.P.
RICHARD A. BROWN
CHARLES B. LAWRENCE
ARTHUR D. SPATT, JJ.

Motion No. 8257 & 8331

In the Matter of the Estate of Ivan C. McLeod, deceased.

Frances E. R. Harrisingh, administratrix-appellant, Benedict Ginsberg, Esq., respondent, John A. Fowler, Esq., Guardian-ad-Litem-respondent.

Motion by administratrix-appellant for an order of this court directing the chief clerk of the Surrogate's Court, Westchester County, to present the minutes of a hearing in the administration of the Estate of Ivan C. McLeod, deceased, on July 14, 1986, to the Surrogate immediately, for settlement in connection with the appeal

from an order of the Surrogate's Court, Westchester County, entered April 26, 1988.

Cross motion by the Guardian-ad-Litem to dismiss the appeal on ground that the order sought to be reviewed is not appealable and if appealable, such appeal is without merit.

Upon the papers filed in support of the motion and cross motion and the papers filed in relation thereto, it is

ORDERED that the motion and cross motion are denied.

ENTER:

Martin H. Brownstein
Clerk

December 8, 1988

APPENDIX C - ORDER ESTABLISHING CREDITOR'S CLAIM, DENYING REVOCATION OF LETTERS OF ADMINISTRATION AND COMPULSORY ACCOUNTING

File No. 937/1979

At a Term of the Surrogate's Court held in and for the County of Westchester, at the County Courthouse, 111 Grove Street, in the City of White Plains, on the 21st day of May, 1981.

PRESENT: HON. EVANS V. BREWSTER, Surrogate.

- -

In the Matter of the Administration of the Estate of IVAN C. McLEOD, Deceased.

- -

LORETTE BINNS, a creditor of the Estate of Ivan C. McLeod, Deceased, having moved this Court for an order compelling the administratrix to account, revoking the letters of administration issued to the administratrix, and establishing the validity of the claim of Lorette Binns against the Estate of Ivan C. McLeod;

NOW, upon reading and filing the Statement of Claim of Lorette Binns verified the 2nd day of December, 1979, the af-

fidavit of Lorette Binns sworn to the 2nd day of December, 1979, the citation dated the 31st day of July, 1980, the petition of Lorette Binns verified the 21st day of July, 1980, together with the exhibits annexed thereto, and the affidavit of Philip A. Mittleman, sworn to the 16th day of September, 1980, all in support of said motion, and the affidavit of Mary E. McLeod, sworn to the 10th day of December, 1979, the notice to vacate the citation dated August 26, 1980, the affirmation of Frances E. R. Harrisinah dated August, 1980, the affidavit of Frances E. R. Harrisinah(titled Notice of Motion to Dismiss Petition), sworn to the 27th day of August, 1980, together with the exhibits annexed thereto, the Notice of Motion to Reply to Plaintiff's Affidavit in Opposition dated October 14, 1980, the affidavit of Frances E. R. Harrisinah

sworn to the 23rd day of September, 1980, and the affidavit of Frances E. R. Harrisingh sworn to the 3rd day of October, 1980, and upon the interlocutory order of this Court dated November 28, 1980 denying the motion to dismiss the citation, and upon all the proceedings heretofore had herein, and a hearing on the claim of said Lorette Binns having been set down for trial on the 14th day of November, 1980, and the Court having taken the testimony offered at said trial, and after hearing Benedict Ginsberg, attorney for the petitioner in support of said motion, and in support of the claim of said Lorette Binns, and Frances E. R. Harrisingh, Esq., attorney for and administratrix of the Estate of Ivan C. McLeod in opposition thereto, and due deliberation having been had, upon the decision of this Court dated April 22, 1981,

NOW, on motion of BENEDICT GINSBERG, ESQ., attorney for the petitioner, it is

ORDERED, that the claim of Lorette Binns be and the same hereby is in all respects granted; and it is further

ORDERED, that the petitioner is declared to have a lien on real property of Ivan C. McLeod to the extent of one-half of the net proceeds to be derived from the sale thereof; and it is further

ORDERED, that the respondent's motion to dismiss the proceeding and the claim of the petitioner be and the same is in all respects denied; and it is further

ORDERED, that the petitioner's motion to revoke the letters of administration issued to the respondent be and the same hereby is in all respects denied., that the application for compulsory ac-

counting be and hereby is denied.

/s/ Evans V. Brewster
Surrogate

APPENDIX D - WAIVER AND CONSENT OF WIDOW OF DECEASED

File No. 937/1979

STATE OF NEW YORK
SURROGATE'S COURT : WESTCHESTER COUNTY

In the Matter of the Judicial Settlement of the Account of Proceedings of FRANCES E. R. HARRISINGH as ADMINISTRATRIX of IVAN C. McLEOD, deceased

---

TO THE SURROGATE'S COURT OF THE COUNTY OF WESTCHESTER:

MARY E. McLEOD the undersigned, being a person interested as Widow in the estate of IVAN C. McLEOD, do hereby waive the issue and service of a citation in the above entitled matter and consent that a decree be made, settling the account of said FRANCES E. R. HARRISINGH, ADMINISTRATRIX

/s/ Mary E. McLeod

State of Florida)
County of Brevard) ss.:

On this 15th day of June, 1983, before me personally came MARY E. McLEOD

to me known and known to me to be the person described in and who executed the foregoing instrument, and duly acknowledged that she executed the same.

/s/ Ruth Contrell
Notary Public

(SEAL)

Notary Public State of Florida at Large
My Commission expires
April 12, 1986

APPENDIX E - ORDER APPOINTING GUARDIAN-AD-LITEM FOR WIDOW OF DECEASED

File No. 937/1979

At a Surrogate's Court, held in and for the County of Westchester, at the Surrogate's Office, in the City of White Plains, on the 1st day of August, 1985.

Present: HON. EVANS V. BREWSTER, Surrogate.

In the Matter of the Judicial Settlement of the Account of Proceedings of

Frances E.R. Harrisingh as Administrator of the Estate of Ivan C. McLeod, Deceased.

IT APPEARING by the petition that Mary E. McLeod, A DISABLED PERSON, is or may be an incompetent not appearing by any guardian; and on reading or filing the consent of John A. Fowler of the City of White Plains, to be appointed to serve as the Guardian Ad Litem for the said, Mary E. McLeod for the purpose of taking care of her interests in the proceeding, it is

ORDERED, That the said John A.

Fowler be, and hereby is appointed the Guardian ad Litem for the said Mary E. McLeod to take care of her interests in this proceeding.

/s/ Evans V. Brewster
Surrogate.

NOTARIZED STATEMENT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

ANTONIO MARENO, being duly sworn, deposes and says that: I am an attorney duly admitted to practice law in the United States Supreme Court. On October 11, 1990, I served the within Petition for Writ of Certiorari upon John A. Fowler, Esq., the respondent in this proceeding, by depositing 3 copies of same in a post-paid wrapper in a U.S. Post Office within New York State addressed to said respondent c/o McCarthy, Fingar, Donovan, Drazen & Smith, Esqs., 11 Martine Avenue, White Plains, New York 10606.

_____
Antonio Mareno

Sworn to before me this
11th day of October, 1990.